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No. 98-1059

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

NATIONAL ASSOCIATION FOR BIOMEDICAL RESEARCH,

Petitioner,

v.

ANIMAL LEGAL DEFENSE FUND, INC., *et al.*,

Respondents.

On Petition For Writ of Certiorari to the
United States Court of Appeals
For the District of Columbia Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals for the D.C. Circuit correctly ruled that a person who derives aesthetic enjoyment from viewing primates but who witnesses them in barren environments and in isolation from other primates has standing to challenge an agency regulation that fails to promote the psychological well-being of primates when the agency is mandated by the Animal Welfare Act to promulgate such regulations.

RULE 29.6 LISTING

Respondent Animal Legal Defense Fund is a nonprofit corporation qualified for tax exempt status under 26 U.S.C. § 501(c)(3). It has no parent companies and no nonwholly owned subsidiaries.

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Respondents Animal Legal Defense Fund ("ALDF"), Marc Jurnove, Mary Eagan and Roseanne Circelli oppose the petition for a writ of certiorari that was filed by the intervenor National Association for Biomedical Research ("NABR"). NABR intervened after the District Court entered judgment for plaintiffs on both standing and the merits, and its intervention is currently subject to a cross-appeal pending in the D.C. Circuit.

NABR's petition does not set forth all of the facts pertinent to the Court's consideration of whether *certiorari* should be granted and it misrepresents certain other critical facts. In addition, NABR has not satisfied any of the criteria under which this Court grants review of appellate decisions. Accordingly, respondents will first set forth their counterstatement of the case and then explain why the Court should not grant review.

COUNTERSTATEMENT

The issue decided by the court of appeals was whether an individual has standing to challenge under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, a regulation issued by the United States Department of Agriculture ("USDA") pursuant to the Animal Welfare Act ("AWA"), 7 U.S.C. §§ 2131 et seq. The AWA governs the handling and care of animals that are held in captivity for exhibition, experimentation and sale. In 1985, Congress amended the AWA to provide that the USDA "shall promulgate standards to govern the humane handling, care, treatment, and transportation of animals," and that such standards "shall include minimum requirements . . . for a physical environment adequate to promote the psychological well-being of primates," 7 U.S.C. §2143(a)(2)(B).

Despite USDA's specific determination that it *could* promulgate standards that would promote the psychological well-being of primates, 56 Fed. Reg. 6426, 6474 (1991) (emphasis supplied), the final regulation USDA promulgated left the establishment of such standards to the very entities whose inadequate handling of this matter led Congress to require that the *agency* promulgate such standards. In addition, although the agency had determined that "non-human primates . . . require contact with other nonhuman primates for their psychological well-being," and that "social deprivation is regarded by the scientific community as psychologically debilitating to social animals," 54 Fed. Reg. 10822, 10917 (March 15, 1989) the agency's final rule nevertheless permits regulated entities to house primates in isolation from each other.

NABR has not adequately explained either the statutory or regulatory history of the challenged regulation. A review of these histories is necessary to explain why the court of appeals' ruling that the plaintiff has standing does not conflict with other circuits' standing precedents and is fully consistent with this Court's precedent.

The 1985 Amendments to the AWA required that USDA "shall" issue "standards" that promote the psychological well-being of nonhuman primates held in zoos and laboratories. USDA has recognized that the impetus for the amendments, "arose from market failures to produce a socially acceptable level of animal welfare in the production activities of the regulated entities (animal breeders, dealers, exhibitors, . . . and research facilities)." *See* Animal and Plant Health Inspection Serv., U.S. Dep't of Agric., Final Regulatory Impact and Regulatory Flexibility Analysis of APHIS Animal Welfare Regulations, Pt. 3, Subparts A and D (1991), Court of Appeals Administrative Record ("AR") 682, 686.

The statutory language of the 1985 Amendments was a product of consensus between the scientific community and animal protection groups. 131 Cong. Rec. 14,161 (1985) (statement of Sen. Dole). [1] Thus, NABR was well aware that, as a result of the mandatory statutory requirements, its members would have to comply with USDA-imposed requirements to promote the psychological well-being of nonhuman primates.

The USDA first proposed regulations for primate psychological well-being in 1989. 54 Fed. Reg. 10,822 (March 15, 1989). Central to the proposed regulations was a standard for the social housing of primates, *i.e.* primates normally would have to be kept together with members of their species. USDA explained that this requirement was "based upon scientific evidence and [agency] experience, both of which indicate that nonhuman primates . . . require contact with other nonhuman primates for their psychological well-being," and that "[s]ocial deprivation is regarded by the scientific community as psychologically debilitating to social animals," 54 Fed. Reg. at 10,917 (March 15, 1989). Accordingly, the proposed regulations provided that

> [n]onhuman primates must be housed in primary enclosures with compatible members of the same species, . . . in pairs, family groups, or other compatible social groupings unless the attending veterinarian determines that doing so would endanger the health, safety and well-being of the nonhuman primates.

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[1] Biomedical research organizations had opposed every bill introduced to improve conditions for animals in laboratories prior to passage of the Animal Welfare Act in 1966 and subsequent strengthening amendments to that Act. *See* Gary L. Francione, *Animals, Property and the Law* 189-94, 198-99 (1995)

Proposed § 3.80(b), 54 Fed. Reg. at 10,944 (March 15, 1989).

The proposed rule also provided a list of minimum standards that regulated entities would be required to meet. For example, the proposed rule would have required the regulated entities to: a) enrich the environment by providing species-typical activities, Proposed § 3.81(a)(1), 54 Fed. Reg. at 10948 (March 15, 1989), b) release individually-housed primates into a much larger enclosure than their primary cage for 4 hours of exercise and social interaction, Proposed § 3.81(a)(3), 54 Fed. Reg. at 10948 (March 15, 1989), and c) provide additional environmental enrichments, social interaction and exercise for young primates, those on restricted activity, and those in psychological distress, Proposed § 3.81(a)(4)(i)-(iii), 54 Fed. Reg. at 10949 (March 15, 1989). The USDA concluded that "the space requirements of proposed § 3.80(c)(1), together with the requirements in § 3.81 will promote the psychological well-being of primates ," 54 Fed. Reg. at 10,920 (March 15, 1989).

NABR criticized the proposed regulations, claiming that "they paint a very detailed picture of laboratory animal care. They tell you point by point --- and that's exactly what we object to." *See* Gwen Rubinstein, *Creature Discomforts*, Gov't Info. Insider, June 1990 at 11. NABR spent the next two years opposing the proposed regulations that specified how it and other regulated entities must improve the physical environments provided to primates.

The USDA then significantly modified its regulatory approach. *See* Carol Matlack, *Animal Rights Furor*, The Nat'l J., Sept. 7, 1991, at 2143. ("And after the association [NABR] swamped the Agriculture Department with thousands of complaints from scientists, the department significantly

weakened new regulations on the treatment of lab animals that Congress had mandated in 1985.") Thus, instead of specifying the minimum standards governing the physical environments that will promote a primate's psychological well-being, USDA changed the regulations to provide that regulated entities need only develop their own "plans" that "consider" and "address" in some fashion those aspects of a primate's environment that USDA found critical. *See* 9 C.F.R. § 3.81 (1997). In addition, USDA changed its requirement for the social housing of primates to provide that the regulated entities' "plans" must simply "address" the social needs of primates, but that the "plans" need not require group housing. 9 C.F.R. § 3.81(a). These "plans" only have to be submitted to USDA if USDA requests them. 9 C.F.R. § 3.81 (1997).

In its petition, in an effort to undercut the causal link between the challenged regulation and plaintiff's injury, NABR twice misrepresents that the final regulation at issue requires social grouping, Pet. at 4 & n.1[2]. However, even the USDA expressly recognized that this characterization of the final rule is incorrect. Thus, in the supplementary information provided in the preamble to the final rule, the USDA explained that the regulations "do not specifically call for group housing of nonhuman primates." 56 Fed. Reg. at 6472 (1991).

PROCEEDINGS BELOW

Plaintiffs brought this lawsuit in 1996. Plaintiffs include persons who enjoy visiting primates in zoos and whose

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[2] NABR represents that "[e]xceptions to 'social grouping' are permitted only in specific circumstances enumerated in the regulation." Pet. at 4. In a footnote, NABR makes the same misrepresentation a second time ("Exceptions [to social grouping] are permitted only . . .") Pet. at 4 n.1. Social housing, social grouping and group housing are synonymous terms that describe housing primates together as a social unit.

aesthetic interests in observing and enjoying primates in such settings are harmed because, under the challenged regulations, primates they visit are housed alone and in barren environments. NABR did not move to intervene in the District Court proceedings to challenge plaintiffs' standing nor for any other reason.

Plaintiffs filed a motion for summary judgment and submitted affidavits in support of their standing to bring the case, including the affidavit of plaintiff Marc Jurnove. Plaintiffs' Appendix ("Pl. App."). Mr. Jurnove's affidavit explained that he visits an animal exhibitor in his community for the purpose of observing and enjoying the animals who live there. He further explained that he has become particularly attached to several primates that are housed there, but that his enjoyment of these animals is greatly impaired because the primates are kept in isolation and in barren environments. *See* Jurnove Affidavit at ¶¶ 7-9, 14-15, 17, 20, 24, 26, 30, 33, 35, 39. Thus, Mr. Jurnove explained that "[w]hat I observed was an assault on my senses and greatly impaired my ability to observe and enjoy these captive animals." *Id.* ¶ 17.

Mr. Jurnove further explained that when he brought these matters to the attention of the UDSA on several occasions, he was informed that the facility was in compliance with all applicable USDA standards, including the provision governing "environment enhancement to promote psychological well-being." *Id.* ¶¶ 18, 22, 32, 42; USDA Inspection Report, Exhibit 1, Plaintiffs' Opposition to Defendants' Motion for Summary Judgment.

Mr. Jurnove also explained that, because of his attachment to these particular animals and his desire to help them, he will continue to visit the facility to see the animals there, to

"provide the USDA with information that may lead to better conditions for these animals," and that he "want[s] to observe, study, and enjoy these animals in humane conditions." *Id.* ¶ 43.

In response, the government did not challenge any of the factual assertions contained in Mr. Jurnove's affidavit, nor did it submit a statement of material facts as to which it claimed there was any dispute. Instead, the government simply argued that the kind of aesthetic injury asserted by the plaintiffs was not sufficient to satisfy the standing requirements of Article III.

After the District Court ruled for plaintiffs on both standing and the merits, NABR moved to intervene for the sole purpose of taking an appeal. Although plaintiffs objected to NABR's intervention, particularly on timeliness grounds, Judge Richey of the District Court permitted NABR to intervene, believing that he was required to do so because of an earlier ruling by the D.C. Circuit. *ALDF v. Glickman*, Civ. No. 96-408 (D.D.C. 1997), Mem. Op. at 7, Court of Appeals Admin. Record ("AR") at 896-97. Plaintiffs filed an appeal of that decision which has not yet been decided. AR at 904.

On December 9, 1997, a divided panel of the D.C. Circuit ruled that plaintiffs lacked standing to bring the case. *Animal Legal Defense Fund v. Glickman*, 130 F.3d 464 (D.C. Cir. 1997), Appendix ("App.") 84a. While expressing doubt that the plaintiffs had demonstrated a cognizable "injury-in-fact," Judge Sentelle, joined by Judge Henderson, nevertheless assumed that plaintiffs had satisfied this prong of the Article III test. *Id.* at 468, App. 88a. However, the majority found that plaintiffs had failed to demonstrate the requisite causation and redressability, expressing their belief that the plaintiffs' injuries flowed not from the government's inadequate

regulations but rather, from the actions of third parties -- *i.e.* the exhibitors of the animals. Judge Wald dissented, explaining that the majority's causation and redressability analysis "illustrates how far the majority opinion has strayed from a reasonable interpretation of standing requirements under Supreme Court and our circuit's law." *Id.* at 471 (Wald, J., dissenting), App. 93a.

Plaintiffs were successful in seeking *en banc* review. *ALDF v. Glickman*, 136 F.3d 829 (D.C. Cir. 1998). On September 1, 1998, in a decision written by Judge Wald and joined by six additional judges (Edwards, Williams, Randolph, Rogers, Tatel and Garland), the court of appeals held that "Mr. Jurnove's allegations solidly establish injury in fact," because his uncontested affidavit demonstrates that he suffers "direct, concrete, and particularized injury to his aesthetic interest in observing animals living under humane conditions." *Animal Legal Defense Fund v. Glickman*, 154 F.3d 426, 431 (D.C. Cir. 1998) (*en banc*), App. 7a.

Judge Wald explained that *this* Court has "repeatedly made clear that injury to an aesthetic interest in the observation of animals is sufficient to satisfy the demands of Article III standing," *Id.* at 432, App. 9a, citing this Court's observation in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 566 (1992) that "[i]t is clear that the person who *observes* or works with a *particular* animal threatened by a federal decision is facing perceptible harm." *Animal Legal Defense Fund*, 154 F.3d at 433, App. 9a (emphasis supplied). Judge Wald further observed that, analogously, both "the Supreme Court and this circuit have frequently recognized the injury in fact of plaintiffs who suffered aesthetic injury stemming from the condition and quality, or despoilation" of a specific environmental area that they use. *Id.* at 434, App. 13a.

The court also held that Mr. Jurnove had demonstrated the requisite causation, since he alleged that the conditions that caused his injuries were *authorized* by the regulations issued by the USDA, and because he had produced evidence that the USDA, in fact, considers the exhibitor in question to be in compliance with all applicable USDA standards. 154 F.3d at 439-40, App.21-22a.

The court likewise held that Mr. Jurnove had demonstrated redressability, since his complaint asserts that more stringent regulations, which prohibit the inhumane conditions that have caused his aesthetic injuries, "would necessarily alleviate Mr. Jurnove's aesthetic injury during his planned, future trips" to the facility to visit the animals there. 154 F.3d at 443, App. 28a. The court therefore remanded the case to a panel of judges to determine the merits of plaintiffs' claims. App. 32a.[3]

In a dissent joined by three judges (Silberman, Ginsburg, and Henderson), Judge Sentelle expressed the opinion that a plaintiff with an aesthetic interest in observing a *particular* animal could not satisfy the injury in fact requirement of Article III, without demonstrating that the challenged governmental action threatened to reduce the *overall* number of all such animals that are available for observation and study. 154 F.3d at 447, App. 35a. The dissent also expressed the opinion that Mr. Jurnove had failed to demonstrate causation, finding that his uncontested assertions and additional proof that the USDA *permitted* the conditions that caused his injuries were "disingenuous" in light of Mr. Jurnove's additional complaints that the agency was not adequately enforcing the regulations it *does* have. 154 F.3d at

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[3] Also pending is plaintiffs' appeal challenging NABR's intervention. D.C. Cir. Appeal No. 97-5074. These matters have been held in abeyance pending the resolution of NABR's petition for *certiorari*. January 22, 1999 Order (D.C. Cir.).

451, App. 42a. The dissent also took issue with whether the challenged regulations actually "authorized" exhibitors to maintain primates in ways that caused Mr. Jurnove's aesthetic injuries, despite the fact that the uncontested record demonstrated that the USDA had determined that the exhibitor in question was in fact in compliance with those regulations. 154 F.3d at 452, App. 432. The dissent further expressed the opinion that Mr. Jurnove had failed to show redressability because he could not prove that any *new* regulations that would be promulgated if the challenged ones were set aside would necessarily redress any of the conditions that caused his aesthetic injuries. 154 F.3d at 454, App. 47a.

Although the government defendants have not sought certiorari of the *en banc* decision, and the merits of plaintiffs' case have not yet been decided, intervenor NABR has petitioned this Court for a writ of certiorari. As demonstrated below, however, none of the criteria governing the granting of such petitions is present here. Accordingly, the petition should be denied.

REASONS FOR DENYING THE PETITION

I. THE D.C. CIRCUIT'S OPINION DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS.

Certiorari is not warranted here because the decision of the court of appeals is not in conflict with the decision of any other federal courts of appeals. Indeed, NABR concedes that there is no conflict between the circuits. Petition ("Pet.") at 12-13. Accordingly, NABR is left to argue that there is a conflict in *principle* because different circuits have given "differing interpretations" of *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982) and the majority did not even cite *Valley*

Forge. However, as explained below, the majority did not cite or discuss *Valley Forge* because that case simply does not apply here. In any event, because petitioner cannot demonstrate that review is necessary to resolve a split in the circuits on *any* issue, let alone one of any significance, *certiorari* is not warranted. Moreover, while review is sometimes afforded because a decision on jurisdiction must be immediately corrected due to the far-reaching consequences such a ruling would have, as respondents demonstrate *infra*, this simply is not such a case.

II. THE DECISION BELOW FAITHFULLY FOLLOWS SUPREME COURT STANDING PRECEDENT.

A grant of *certiorari* is also not warranted because the court of appeals faithfully applied this Court's precedents on standing. As further demonstrated below, the court correctly ruled that plaintiff Jurnove's injuries fall well within this Court's precedents on injury, causation and redressability, as well as within this Court's specific application of these principles in the context of cases brought to challenge government actions that affect animals.

A. Injury In Fact

Noticeably absent from NABR's petition is any explanation of why the injury Mr. Jurnove suffered is not a cognizable injury under *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (hereinafter *"Defenders of Wildlife"*). There, this Court explained that "it is clear that the person who observes . . . a particular animal threatened by a federal decision clearly is facing perceptible harm," 504 U.S. at 566.

Thus, try as it may by repeatedly labeling plaintiff's injuries as "subjective," "ideological," and "emotional," and

arguing that "the decision below is wrong," Pet. at 13, NABR cannot dispute that plaintiff suffered a concrete injury to his aesthetic interest in viewing animals --- an interest long recognized as cognizable for standing purposes. Moreover, as the court of appeals observed, plaintiff Jurnove suffered his injury "in a personal and individual way — for instance, by seeing with his own eyes the particular animals whose condition caused him aesthetic injury," 154 F.3d at 433, App. 9a. That he could, *as a result of the direct sensory impact*, also have suffered psychological distress, is expected, as even NABR acknowledges. Pet. at 12.

However, NABR not only ignores plaintiff Jurnove's affidavit but also twists the holding of *Valley Forge*, 454 U.S. 464 (1982), to suit its own purposes. NABR ignores that plaintiff Jurnove suffered an aesthetic injury as a result of actually *seeing* these animals suffering from isolation and the lack of psychological enrichment. These facts take this case far from the circumstances present in *Valley Forge* and place it squarely within the analysis applied in *Sierra Club v. Morton*, 405 U.S. 727 (1972), and *Defenders of Wildlife*.

In *Valley Forge*, this Court held that persons who were not directly impacted by the allegedly unlawful conduct, but had simply read about the government's actions in the newspaper, had not suffered the kind of concrete injury that is necessary to establish standing. The Court held that the plaintiffs in *Valley Forge* had "fail[ed] to identify any personal injury suffered by [them] *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." 454 U.S. at 486 (emphasis in original). However, when this Court spoke of the "observation of conduct with which one disagrees," it was *not* addressing the actual *visual* observation of illegal conduct by a person whose

aesthetic interests are injured by that conduct, such as the person who actually *observes* a polluted landscape -- an aesthetic injury which, although also subjective, this Court long ago recognized would satisfy the "injury" requirement of Article III. *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972).

Nor did *Valley Forge* address the kind of plaintiff who actually observes harm inflicted on a "particular animal," which, as this Court recognized in *Defenders of Wildlife*, 504 U.S. at 556, produces "injury" for standing purposes. Rather, in *Valley Forge*, the Court was simply recognizing that plaintiffs do not show the necessary "injury in fact" when they simply disagree with conduct that the government is taking somewhere in the country, but which does not impact those particular plaintiffs in any direct way. Accordingly, that decision is not implicated here, and, therefore, not surprisingly, the majority opinion below had no reason to address it.

A central theme of NABR's petition is that a plaintiff can not suffer injury to a cognizable interest unless he complains of a diminution in the overall number of animals of that species that will now be available for observation as a result of the challenged government action. Pet. at 11-12. Of course, this proposition ignores this Court's observation in *Defenders of Wildlife* that "a person who *observes* or works with a *particular* animal threatened by a federal decision is facing perceptible harm . . . ," 504 U.S. at 566. Indeed, under NABR's analysis, as well as that of the dissent below, a court could never hear the case of persons who complained of harm to a particular national park they frequented unless the government action would result in destroying *all* national parks.

NABR's petition further suffers from a failure to grasp one of the most basic concepts of standing jurisprudence — that standing is a highly case-specific inquiry. NABR fails to appreciate that a majority of the standing cases it discusses were brought pursuant to the APA, which requires an analysis of the injury asserted in light of the statute the plaintiff claims the agency violated. Here, for example, the AWA is not concerned with maintaining a certain population of endangered animals. Therefore, where a plaintiff is complaining about an agency's intentional violation of a statute requiring that it set standards for an environment that promotes a primate's well-being, it would make absolutely no sense for the plaintiff to complain that this challenged action resulted in diminishing the number of animals available for observation. However, it is perfectly logical for a plaintiff who enjoys observing and studying particular primates in captivity to complain of a regulatory scheme that results in those animals being kept in isolation and in barren environments. Thus, as the 7-judge majority of the D.C. Circuit explained

> the Animal Welfare Act, with which we deal here, is explicitly concerned with the quality of animal life, rather than the number of animals in existence. It seeks to promote the psychological *well-being* of primates. Quite naturally, suits alleging violations of this statute will focus on the conditions under which animals live.

154 F.3d at 438, App. 18a (emphasis in original) (statutory citations omitted).

Moreover, contrary to NABR's assertions, Pet. at 13-14, as well as those of the dissent below, one need not foray into such areas as what Mr. Jurnove thinks is "humane," because in this case there is a record of the agency making an expert

determination of what is needed to provide a physical environment that will promote the psychological well-being of nonhuman primates --- and then choosing not to require it.

Indeed, the plaintiff was visually impacted by the very same conditions that the defendant agency stated it knew were psychologically debilitating to primates --- *e.g.*, keeping primates isolated from each other. Therefore, there is absolutely no need to speculate as to the veracity of the plaintiff's allegations about what he witnessed and its impact on him, nor is such speculation in the least bit appropriate when the plaintiff's sworn affidavit was completely uncontested before the District Court. The bottom line here is that an agency was ordered by Congress to issue standards to accomplish a statutory goal --- *i.e.*, to require environments that promote the psychological well-being of nonhuman primates. Instead, the agency left that task to the very entities which had demonstrated that --- in the absence of specific mandated instructions from the agency --- they would not take the actions necessary to promote the psychological well-being of nonhuman primates. This failure on the part of regulated entities prompted Congress to enact the 1985 Amendments to the AWA. *See supra at 2.* Under the Administrative Procedure Act, such derelictions of statutory duty may be challenged by persons who are injured by that conduct --- precisely what was done here[4].

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[4] NABR's assertions in the form of a parade of horribles of all sorts of private party conduct that can now be challenged as a result of this decision is a red herring. Pet. at 16-17. As NABR well knows, there is no private right of action against private parties such as NABR's members under the Animal Welfare Act. *See, e.g., International Primate Protection League v. Institute for Behavioral Research*, 799 F.2d 934 (4th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987). Accordingly, the decision below provides no basis for challenging third party conduct under that statute.

B. Causation

This Court's recent decision in *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, (*"NCUA"*) ___U.S. __ , 118 S.Ct. 927 (1998), although a "zone of interest" case, demonstrates that the court of appeals correctly ruled that plaintiffs satisfy the causation requirement of Article III --- *i.e.*, that plaintiffs' injuries are "fairly traceable" to the defendant's unlawful conduct. *Valley Forge, supra,* 454 U.S. at 472.

NCUA involved a challenge by several commercial banks to the National Credit Union Administration's construction of its governing statute that allowed credit unions to include in their membership businesses that are unaffiliated with the credit unions' existing membership. Although this Court acknowledged that the plaintiffs must demonstrate that they meet all of the standing requirements of Article III, __ U.S. __, 118 S.Ct. at 933, neither the majority nor the dissent ever suggested that there was a causation problem, simply because the government "permitted," but did not "require," a third party to engage in conduct that resulted in injuries to the plaintiff.

As in that case, here the plaintiff complained that his injuries result from the government's unlawful decision to allow regulated entities to conduct their business in a way that would *not* be allowed if the government were required to fulfill its statutory mandate. In other words, if the USDA promulgated the "standards" for the psychological well-being of primates, as required by the AWA, it would be illegal for regulated entities to develop their own "plans" for this aspect of primate care. Accordingly, as this Court obviously assumed in *NCUA*, plaintiff's injuries are "fairly traceable" to the government's unlawful conduct.

Indeed, as the majority below recognized, the Supreme Court has several times ruled that plaintiffs demonstrate standing when the challenged agency action "authorizes" the conduct that causes their injuries, when such conduct "would have been illegal without that action," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 44, n.25 (1976); *Investment Co. Inst. v. Camp*, 401 U.S. 617, 620-21 (1971); *Data Processing Serv. v. Camp*, 397 U.S. 150, 152 (1969). Here, because Congress directed USDA to address the problem of regulated entities *not* providing for the psychological well-being of primates, the USDA's final regulation which allows these entities to continue to ignore this aspect of primate care by keeping the animals in isolation without any minimum psychological enrichment, authorizes the very conduct that is causing plaintiff's injuries. Accordingly, the court of appeals correctly applied this Court's precedent on this prong of the standing test.

C. Redressability

The court of appeals also correctly ruled that Mr. Jurnove had demonstrated the requisite redressability. Thus, if Mr. Jurnove prevails on the merits, entities subject to the AWA, including the facility he visits, will no longer be permitted to house primates in isolation and without a physical environment that promotes their well-being. Unless the regulated entity decides to violate the new regulations, and subject itself to both civil and criminal penalties for doing so --- a speculative and highly unlikely outcome that the plaintiff is not required to disprove, *Duke Power Co. v. Carolina Envt'l Study Group, Inc.*, 438 U.S. 59, 78 (1978) --- this relief will more than "partially redress" Mr. Jurnove's injury, *Meese v. Keene*, 481 U.S. 465, 476 (1987), which is all that this Court requires to meet the redressability test.

As this Court recently recognized in *Federal Election Comm'n v. Akins*, ___ U.S. ___, 118 S.Ct. 1777 (1998), redressability is present "[i]f a reviewing court agrees that the agency misinterpreted the law, [because] it will set aside the agency's action and remand the case." ___ U.S. ___, 118 S.Ct. at 1786. This is precisely what the plaintiff has requested here. Furthermore, under *Bennett v. Spear*, ___ U.S. ___, 117 S.Ct. 1154 (1997), the Court assumes that the regulated third party will conform its conduct to comply with a mandated legal regime. ___ U.S. ___, 117 S.Ct. at 1168.

III REVIEW OF THE STANDING ISSUE PRESENTED BY NABR WOULD BE PREMATURE.

NABR did not intervene in this case until after judgment was entered in plaintiffs' favor in the District Court. Because this was the second time that NABR had waited until after judgment to seek intervention --- and because, in this instance, there was no question that the government was going to appeal the ruling, thereby fully protecting NABR's interests --- plaintiffs filed their own appeal on the issue of whether the District Court properly allowed NABR's post-judgment intervention. This issue has not yet been resolved by the court of appeals.

Therefore, because the government has not sought *certiorari*, should plaintiffs prevail in *their* appeal challenging NABR's intervention, this Court would not have to resolve the standing issue that NABR seeks to present. By the same token, the merits of the plaintiffs' case are also still pending before the Court of Appeals. Indeed, it is for reasons such as these that this Court generally awaits final judgment in the lower courts before exercising *certiorari* jurisdiction. *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993); *American*

Const. Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U.S. 372, 384 (1893). Accordingly, there is no reason why this Court should exercise its discretion to hear this case at this juncture.

IV. NABR HAS PROVIDED NO OTHER PERSUASIVE REASON WHY THIS CASE MERITS REVIEW.

None of the additional reasons NABR urges as a basis for review has any merit. First, NABR argues that if individuals have standing under the AWA, challenges could be brought against regulations affecting research facilities, as well as zoos. Pet. at 16-17. However, NABR cites no reason whatsoever as to why research facilities should not be governed by the same regulations that govern other entities housing primates. Indeed, the AWA very explicitly applies to both kinds of facilities.

Moreover, it bears noting that, pursuant to the AWA, NABR members and other research facilities already enjoy a complete exemption from regulations addressing how research is conducted. Thus, the statute provides that, "[n]othing in this chapter . . . shall be construed as authorizing the Secretary to promulgate rules, regulations, or orders with regard to the design, outlines, or guidelines of actual research or experimentation by a research facility as determined by a research facility." 7 U.S.C.§ 2143(a)(6)(A). NABR's interest asserted here is in *further* exempting itself from having to comply with AWA regulations governing the care of primates while those primates await their use in research. However, the statute recognizes no such additional exemption. Accordingly, there is no reason why NABR members should not have to comply with new regulations if the challenged regulation is found to be illegal, once this case is decided on the merits.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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March 1, 1999

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANIMAL LEGAL DEFENSE FUND, INC ,
et. al., Plaintiffs

v.

DANIEL GLICKMAN, Secretary,
United States Department of
Agriculture, et al ,
Defendants

Civil No. 96-408
(CRR)

AFFIDAVIT OF MARC JURNOVE

1. I am a plaintiff in this case I submit this affidavit in support of Plaintiffs' Motion for Summary Judgment and in support of Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss and Motion for Partial Summary Judgment.

2. I have personal knowledge of the facts and matters contained in this affidavit.

3. I was born on March 18, 1950 and am now 46 years old. Due to my upbringing and religious beliefs, I became sensitive to many areas of human and animal suffering at an early age. During my entire adult working life, I have been

employed and/or worked as a volunteer for various human and animal relief and rescue organizations. From 1969 to 1982, I served as a volunteer Auxiliary Police Sergeant. From 1972 to 1985 I was a volunteer fireman. I am still a N.Y. State certified fire inspector. Since 1972, I have been a shelter manager for the American Red Cross, assisting in national and international disasters. In this capacity, I have also been involved in the emergency housing and care of pets and livestock displaced by disasters. Since 1975, I have been an Emergency Medical Technician and an Advanced First Aid Instructor.

4. I have also been employed and/or served as a volunteer in the field of animal welfare. From 1970 to 1988, when I retired at the rank of Lieutenant, I was a Mounted Park Ranger. Besides my mounted duties, which included directing daily activities, training mounted officers in the proper care of their horses, calling the equine veterinarian and blacksmith when needed, I was assigned to handle illegal trapping and any animal related problems in the park system. From 1972-1984, I was the chief investigator for the Long Island Humane Society.

5. From 1977-1984, I was a special agent for the American Society for the Prevention of Cruelty to Animals, which has statutory law enforcement responsibilities within the State of New York. There, I was assigned to the special investigation unit where I handled equine, livestock, exotic animal, pet store and petting zoo types of animal welfare cases.

6. Since 1979, I have been a New York State representative of the American Horse Protection Association. In that capacity, I investigate complaints of mistreatment or abuse of equines, educate the public about proper equine care

and assist with investigations when requested. Since 1979, I have also been a licensed wildlife rehabilitator; this task requires a thorough knowledge of caring for injured wildlife, both domestic and exotic. In the past, due to my knowledge of exotic and sea mammals, several federal agencies have requested my involvement in investigating exotic and sea mammal neglect at various zoo attractions. By virtue of my training in wildlife rehabilitation and my experience in investigating complaints about the treatment of wildlife, I am very familiar with the needs of and proper treatment of wildlife.

7. Because of my familiarity with and love of exotic animals, as well as for recreational and educational purposes and because I appreciate these animals' beauty, I enjoy seeing them in various zoos and other parks near my home. I do not have the resources or opportunity to see many of these species in the wild. I had never visited the Long Island Game Farm before but in mid-May of 1995, in my capacity as an equine investigator, I was apprised that several ponies needed to be checked on at that location. Once I was there, in furtherance of my appreciation for exotic animals and my desire to observe and enjoy them, I began to look around at the other animals housed there. I immediately became concerned for their welfare due to the conditions they were housed in and various signs of illness or injury that they were displaying. I spent approximately six hours at the Game Farm that day observing the animals.

8. I saw a large male chimpanzee named Barney in a holding area by himself. He could not see or hear any other primate. I saw Barney sitting there holding himself with one arm while he stuck his other arm out of the bottom of his cage, begging for food from the visitors. No matter where he reached his hand out it was right next to a clamp or broken

cage piece. He had cuts all over his hands and scars and cuts on the bottom of his feet. I know that chimpanzees are very social animals and it upset me very much to see him in isolation from other primates. I also was concerned when I saw workers running by or driving golf carts by while yelling and laughing at him. This apparently upset Barney as well because he would scream, grab a tire that was hanging in his cage and pick up objects, including food, from his cage to throw at the workers as they passed by. When Barney's frustration and isolation became too unbearable for me to keep watching, I left this location and went on to see other animals.

9. The next animals I saw were three, approximately three-month-old young bear cubs that were kept in a small, round pen. These bear cubs were continuously pacing back and forth around the inside perimeter of the cage. They would walk a few feet, turn around and go the other way, go a few feet in that direction and turn around and keep repeating this without stopping. I watched them continue this activity for almost an hour until they would fall down in deep muck that was at the bottom of their cage, since there appeared to be no real drainage. There was a small barrel in this cage that would allow one of the cubs to escape laying in this mud but the others would have no dry area if it was occupied. Any rain with the slightest wind would soak these cubs. I later saw that when the cubs woke up, they lay in the muck while eating their food that had fallen out of their food dish into the mud. The cubs then began their pacing and kept repeating the cycle while making screaming noises. Watching these bear cubs continually pace in their small cage, with inadequate protection from the rain and wind, eating their food from the mud and muck in their cage greatly affronted and disturbed my enjoyment of these animals and made me want to

something to improve their conditions so that they were being treated humanely, and I could observe and enjoy them under better circumstances.

10. Next I saw two adult bears in a pen with a cement floor. The bears' fur was covered and completely matted with feces. The bears were attempting to get into a shelter, which I later found out had a door that led directly into a shelter for two squirrel monkeys. The main food for these bears was dumped into a drainage trough that runs along the outside of the cage. This trough also collects the body waste of the bears that is washed into it from the inside floor area by a high pressure hose to clean the cage. The bears' food had flies on it. On future trips to the zoo I would see the flies increase on their food as the weather got warmer until the point that in September of 1995, the bears' food was entirely covered by flies.

11. The pen next to the adult bears housed the squirrel monkeys that I mentioned. I observed the monkeys repeatedly walking over to the door and sniffing and acting very upset when the bears came near. I could not believe that any knowledgeable exhibitor would construct the cages of such species right next to each other.

12. I next saw camels and a llama. The camels were busy breaking off large sections of their shelter and chewing them. The shelter had holes all over in the roof and walls from the camels' prior eating of it. Camels, as other hoofed stock, will eat wood when they are not getting enough roughage in their diet. In the llama enclosure, the shelter overhang was only large enough for less than half of the animals at one time. There was hardly any other shade present. Under one tree that had a large puddle from drinking water were a few llama laying there trying to get shade. Their hair coats were

extremely matted, making them inadequate barriers to wind and rain.

13. The Barbados sheep pen had wire mesh that the sheep could stick their heads through and get caught on. Sharp wire ends stuck out in the mesh opening and I could see the metal was bent in places that the sheep did stick their head into. I also viewed a worker dump the hay he was feeding these sheep into a large mud puddle on the ground.

14. I viewed a monkey cage that was a distance from and not in view of the other primate cages. This cage was around 5 feet, with a single wire ledge on one side. There was no solid area for the Japanese Snow Macaque, "Samantha," inside it to lay. There was no heat lamp present for this animal. I viewed Samantha in the middle of her cage huddled up with her head tucked in and arms hugging herself. She would just raise her head to look up briefly but she would then tuck it back in. She was shivering quite noticeably; the temperature was approximately 51 degrees that day. The only cage enrichment device this animal had was an unused swing. The bottom wire mesh of this monkey's cage was wide enough for the animal's limbs to pass through it.

15. Next I saw a large cage holding five Capuchin monkeys. The cage bottom was covered with more than half its surface with pools of water due to improper grading. Food remains and old feces covered the cage bottom. Food and debris were building up under the space between the cement floor and cage meshing, and there was a very strong stench coming from the cage. The cement floor in and around the outside was cracked and breaking up with holes all around in which feces collected. An outside drainage system around the cage was also in poor condition.

16. I next saw a cement walled area containing rabbits. Their water bowl was flipped over and no water was available for the six hours I was at the Game Farm that day. Other rabbit cages I observed were dirty, with bottom mesh that allowed rabbit foot pads to go through and had no inner shelter boxes. The main holding structure had a general overhang that, while giving some shade, would not keep the animals dry in a rain storm.

17. At this point, upon seeing all of these animals housed in conditions that were appalling and that I knew violated the minimum requirements of the Animal Welfare Act, and which were otherwise harming the animals in various ways, I could not stand it any longer and left. What I observed was an assault on my senses and greatly impaired my ability to observe and enjoy these captive animals.

18. The next day, I started to contact agencies to see if I could get help for these animals. I called USDA. Dr. Geib took my call which was also followed up by a written complaint. I asked for a copy of any inspection report under the Freedom of Information Act that the agency would generate once they went to the Game Farm to inspect. On May 3 1995, USDA inspected the Farm. Their report states that they found the facility in compliance with all the standards. When I called USDA to follow up on this, they said nothing was wrong.

19. Because I knew that the USDA inspection report was incorrect, and I desperately wanted to somehow improve the living conditions of these animals, I returned to the Farm in June, July and August, 1995 to document the violations with photographs which I then sent to USDA.

20. When I returned to the Game Farm on July 17, 18 and 19, 1995, I saw the animals in virtually the same conditions

they were in when I first visited the Game Farm in May, 1995. The welfare of the animals was in ever greater jeopardy at this time because the heat was exacerbating many of the animals' problems. I saw the bears still with their matted coats and I knew that this condition made it harder for them to keep themselves cool. The baby bears were still engaging in their repeated pacing, falling down and eating out of the filthy bottom of their cages. The baby bears kept up this repetitive behavior for the entire six hours I was there, even when the temperature reached 88 degrees. I saw Barney, the chimpanzee, lying on the ground of his enclosure, staring into space and grasping onto the wire side of his cage, his hands and feet still scarred and calloused from contact with the broken wire on his cage and the cement floor of his cage. I saw Samantha still alone in her cage with no solid part on which she could comfortably sit. I saw a cougar that was kept in a cage; the animal had no water bowls to drink from. She did have an automatic water system that I understood the Game Farm was trying to get her to use. Over the course of the three days that I was there I did not see the cougar drink from this system at all. I observed the cat trying to climb wooden poles but since the cat had been declawed the cat would fall and slam against the metal fencing or on its head in the cage.

21. The USDA inspection report of July 21, 1995 cited improper shelter for the bears llamas and sheep and Barbados sheep with a correction date of September 21, 1995. USDA wrote up the chimp tower fence being pulled up along with fencing in several areas, but only in regards to the public safety fencing, not the major enclosures I took pictures of in poor condition. The inspectors wrote up the feces buildup in the Capuchins' cage along with the bear and camel dens. Also written up at this inspection was goat hoofs that needed

trimming that I had complained about earlier. The inspectors wrote nothing about the bear cubs' cage condition and food, fencing conditions, the fact that numerous primates were being housed alone, rabbits in 100 degree heat in July without cooling equipment as required by USDA regulations or any of the other conditions I observed, took pictures of or wrote to USDA about.

22. When I saw the inspection report, I called USDA to ask about the conditions that had not been corrected. I was told that the pictures did not show possible problems clearly. Due to this I decided to spend August and September videotaping the conditions that the inspection missed to show exactly what was causing problems. At this point I felt it was my responsibility to try to get the most help for these animals as was practical since USDA seemed lax and selective in what was written up. Thus, while I normally would have enjoyed seeing these animals when they were properly taken care of, and while it upset me very much to continue to see them in poor conditions, I had to make a choice between continuing to subject myself to distress and sadness by observing these animals in poor conditions and not visiting them at all, and hence, doing nothing more to improve their conditions.

23. Had I not continued to visit these animals, I would have nevertheless continued to suffer from what I had already observed since my observations haunted me on a daily basis, as they still do.

24. Disregarding my general health, I spent my time going to the Game Farm documenting my findings with a video camera when the temperatures were in the high 90's. In August, 1995, I made two trips to the Farm. On my first trip to the Farm, I observed Barney the chimp screaming and throwing a tire around and becoming very excited. He then

started to push around a soda can that someone threw near a large hold in the cage that I had reported to USDA on my first contact with them. Barney then ripped the can in half and started to chew on it. He cut his hands and mouth and they started bleeding. I notified one of the workers there, who tried to get Barney to give him the can parts. At this point, some of the other workers began jeering Barney, trying to get him to do body flips. On four occasions Barney started to jump up and down until he became disoriented and banged his head and hurt himself. The staff laughed at this and tried to get him to do it again.

25. I observed the adult bears' sprinkler system was not working and mentioned it to a worker. The bears became progressively more agitated over two days without a way to cool themselves off. This continued throughout the day. Around 3:30 p.m. as I was getting ready to leave, I noticed that the bears had not been fed. One of the workers confirmed to me that the person who was responsible for feeding the animals had not gotten around to feeding them yet.

26. I observed the Japanese snow monkey, Samantha, holding the cage bars and mouthing them, and repeatedly picking at the same part of her body. Apparently, one of the visitors had thrown in a small piece of rag for Samantha. She walked around the cage holding it and when she came to a spot she wanted to sit down on she would spread it out and use it to cushion herself against the wire mesh bottom of the cage. Samantha would bring food back to the rag and sit on it while eating her food.

27. There was another primate, a Black Handed Spider Monkey that was continually scratching himself.

28. When I visited the Farm in August, all of the conditions I had complained about earlier were still in existence. When I returned on September 4, 1995 I noticed all of the problems I had taped previously were still in existence. The Black Handed Spider Monkey was at this point scratching himself to the point of having a difficult time eating. The bear dens and camel shelter were again filthy. Flies covered the feces piled up under the fencing edge of the Capuchin cage and food in the bear cages. The bear cubs had worn a packed trail around the cage fencing with their continuous pacing. I reported all of my findings to USDA.

29. On September 25 and 26, 1995 USDA sent three inspectors to the Game Farm to inspect it. I requested and obtained copy of their inspection report through the Freedom of Information Act. While not dealing with the direct condition of the animals or any allegation I had made about the animals becoming upset, they did write up the fence conditions and stated that the facility must develop an ongoing maintenance program for all fencing, enclosures, and shelters throughout the zoo.

30. I again visited the Farm on October 1, 1995. Once again, conditions and animals were almost exactly the same as I had seen them before. The snow monkey was sitting holding herself and mouthing the bars. Her rag had been taken away. The thoughts of all of the animals stayed with me and still do to this day. At the end of the summer, I went to my doctor who advised I needed a heart valve repair due to the increased strain that had been put on it during the summer. During an operation I was given an artificial heart valve and was put on life support. During this time the only thing I remember was continuously thinking about the Game Farm and the poor conditions of the animals I witnessed there.

31. During the winter months, I wondered how the primates from the Game Farm were doing. I had reviewed an inspection report from the Farm's winter quarters that was completed in 1991. That inspection stated that no animals were found because the Game Farm neglected to tell USDA of its whereabouts. When the USDA did find them, the winter quarters had no health certificate, improper record keeping, poor housekeeping of the primate area that was in a garage and no primate psychological well-being plan present. The next inspection of the winter quarters was not conducted until November, 1994. I asked USDA to check the winter quarters which they did on November 28, 1995.

32. The report provided me from this inspection showed that the primates were found in a room with paint thinners, paint cans and other items in cages very rusted with dirt and grime, with high ammonia levels and that primates were found wet in their cages that had no shelves and no platforms to stay dry on when cages were washed out. The report further found that the primates had no health certificates and there was not a program of veterinary care. I couldn't imagine that in a place that would house primates in such conditions there would even exist a primate well-being "plan", much less that it would be followed, but USDA's inspection report was silent on this regulation. The inspector allowed the "winter quarters" until December 9, 1995 to correct these violations. When I learned this, I became very distraught. When I called USDA at the end of February, 1995 to determine whether the winter quarters were inspected again, I was told that no follow up inspection had been made. I was given the number of the inspector. I called her and she conducted the follow-up inspection on March 4, 1996. That inspection found the main electric panel not working with a correction date of March 9, 1996, that the cages had not been cleaned and no health

certificate or form showing medical treatment could be found. The Game Farm was not given a "correct-by" date for these violations and no follow-up inspection was made.

33. During April, 1996, I was nervously awaiting an eye operation to correct a problem which occurred as a result of medication I was given while in the hospital. A friend of mine suggested that we go and visit the animals at the Game Farm to get my mind off the operation. I agreed to go, believing that it should be an enjoyable trip because of all the improvements that would have been made as a result of USDA's September, 1995 inspection, which I had been responsible for. To my dismay and sadness, I saw the animals in literally the same conditions as I had seen them over the summer of 1995.

34. The bears' den was filthy and slimy and again had a stench to it. Soiled matter was overflowing to the outside of the shelter entrance. Unrepaired wire protruded inside and around the cage. The camels' cage still had a broken wire hole that I saw last year. The shelter floor had a manure depth of 1 foot. Food was still being put on top of body waste. The Black Handed Spider Monkey I worried about that USDA had told me was being treated was rolling on the ground scratching with both hands, with hair missing and reddened, bleeding skin showing. His cage mate was rolling on the ground violently.

35. The Japanese Snow Monkey had no access to a feeding station. No play toys were in her cage. She just sat huddled and shivering violently with head tucked in. She was doing the same thing she had done last April to deal with the cold and the fact she was not provided a heat lamp. The sheep, Barbados sheep pens and a monkey pen still had sharp wire protrusions or holes.

36. Another group of small bear cubs under three months old had been born, taken away from their parents, and placed like last year's group of young cubs, in the same enclosure. I do not know what happened to last year's group of bear cubs, but I did not see them at the Game Farm. This year's group of cubs now engaged in the same pacing from left to right and right to left until they reached the side of the pen. A worker at the Game Farm told me that no food at all is being left in the cage during visiting hours so no one can complain about the condition of the food. Due to this the bear cubs are hungry and active with nothing to do but pace. While pacing they, like last year's group, made screaming noises.

37. While at the Game Farm, I saw several animals in need of veterinary attention. One of the deer had a loud hacking cough, a raccoon was very congested and in a small pen by the donkeys, a llama could hardly walk and was lame in the left rear leg. This

38. I noticed the rabbits still had no proper shelter from the rain to keep them dry and no cooling system existed for high temperatures.

39. When I went on April 28, 1996 I saw Barney. He was engaging in the same behaviors as before. He was still without any other primate ...This was the last time I saw Barney.

40. On June 6, 1996, Barney escaped from his cage and was shot to death by a Game Farm worker. Upon hearing this news, I was extremely distraught and I still am.

41. I am still gravely concerned about the care and welfare of the animals at the Game Farm, especially as the hot weather approaches. What I saw at first shocked me but then has made me very upset and then angry that after USDA goes

to inspect, that corrections still had not been made, that write ups by USDA carry no real meaning because they are not followed by fines or any other punishment. I have concluded that the USDA was just "going through the motions" to placate me because of my many calls and submissions.

42. I have requested and reviewed the May, 1996 inspection reports from the Game Farm. The May 22 and 23, 1996 inspection report fails to cite the Game Farm for inadequate environmental enhancements in Samantha's cage. The only mention of Samantha is that the wire mesh beneath her feeder has been cleaned. Although a continuing violation, inadequate shade for camels and bears, was once again cited, the inspector gave the Game Farm a month to provide adequate shade for these animals. Also in this inspection report, for the first time the inspector cited the Game Farm for inadequate environmental enhancements in Barney's cage (ropes not high enough in cage to allow brachiating). Ironically, the Game Farm was cited for this violation only after this lawsuit was filed. Even more ironically, the "correct by" date given for the Game Farm to correct the violation was the day Barney died.

43. I will return to the Farm in the next several weeks, and I will continue visiting the Farm to see the animals there. I want to observe, study, and enjoy these animals in humane conditions. I worry that their conditions will not have improved, and that I will again experience great distress in observing them under inhumane conditions. However, I also cannot bear <u>not</u> to visit these animals. I continue to think about them, and experience the assault on my senses from remembering their plight. At least if I visit them, I can provide them with some companionship and continue to provide the USDA with information that may lead to better conditions for these animals that will allow me to visit and

observe them, and enjoy them in humane conditions. I feel that if I did not return, I would be deserting them.

Pursuant to 28 U.S.C. 1746 I declare under penalty of perjury that the foregoing is true and correct.

Marc Jurnove

Executed this 12th day of June, 1996